SERVED: July 14, 1994

NTSB Order No. EA-4214

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of July, 1994

STEVEN D. HOLLOWAY, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 137-EAJA-SE-11543

ORDER DENYING RECONSIDERATION

Applicant (petitioner) has asked that we reconsider our decision, NTSB Order EA-4155 (served May 3, 1994), in which we found that his application for recovery of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA), must be denied as late-filed. We deny the petition.

The following events are relevant to our analysis:

August 22, 1991	Initial decision on merits of Administrator's complaint issued. Complaint is dismissed.
August 23, 1991	Notice of Appeal filed by Administrator.
November 19, 1991	Motion to withdraw appeal filed by Administrator.

December 30, 1991 Board order served dismissing appeal on Administrator's motion to withdraw it.

January 30, 1992 EAJA application filed by petitioner.

Our decision, NTSB Order EA-4155, granted the Administrator's appeal of the law judge's decision accepting the application. In replying to the Administrator's appeal brief, petitioner stated (Reply at 12-13):

> The Applicant does not contest that the date of service stated on the Certificate of Service on the Order Dismissing the Administrator's Appeal is December 30, 1991. Further, the Applicant concurs that the Application for Fees and Expenses under the Equal Access to Justice Act . . . was served upon the Board and the Administrator on January 30, 1992.
>
> Applicant may, however, have inadvertently failed to properly calculate the time period for filing of the Application. Applicant was calculating the 30 day period to begin on the date of receipt of the Order Dismissing the Administrator's Appeal which was January 2, 1992. Using this formula, the due date for the Application would be January 31, 1992.

Petitioner followed with argument that the time period for filing may be calculated from the date of receipt, rather than the date of service.[1] Petitioner continued that the Board has discretionary authority to waive its filing rules, and that the Board should exercise that authority to reach the merits of his EAJA application.

In our decision, we recognized judicial precedent requiring strict construction of the application deadline. We cited our rule, at 49 C.F.R. 826.24(a), which requires that EAJA applications be filed "in no case later than 30 days after the Board's final disposition of the proceeding."[2] We held (with no

[1]Petitioner's argument here assumes the applicability of § 826.24(c)(4), but fails to account for that rule's language, which counts time from "issuance," not from service or receipt. See footnote 2, infra, for the full text of § 826.24(c).

[2]Our rule, at § 826.24, continues, as pertinent:

> (b) If review or reconsideration is sought or taken of a decision of which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

contrary argument from petitioner) that, in this case, the Board's final disposition occurred on December 30, 1991, when we issued our order dismissing the Administrator's appeal.

Petitioner now offers totally new reasons why his application is timely. He now contends that, under rule 24(c), subparagraph (3), not (4) as previously acknowledged, is pertinent. Arguably, the date of final disposition here is 30 days after the order dismissing the case was issued because a petition for reconsideration could have been filed up to 30 days after the December 30 decision was issued. Petitioner then cites § 826.38, which provides that an appeal may be taken from the initial decision on the fee application or the Board may review the decision on its own initiative, but that if review is not sought and the Board does not take the case on its own motion, the initial decision becomes final in 30 days. According to petitioner, under these rules the application would have been due 30 days from a final disposition date of January 29, 1992. Petitioner misreads and confuses our rules.

First, in discussing final disposition, our rules obviously are referring to the final disposition of the underlying proceeding on the merits.[3] Thus, petitioner's citation to rule 38, which governs appeals from the law judges' decisions to grant or deny fee applications, is not relevant to determining whether the application itself was originally timely filed.[4]

(..continued)

> (c) For purposes of this rule, final disposition means the later of (1) the date on which an unappealed initial decision becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of the Board's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

[3]The term final disposition, as noted, is from EAJA. Section 504(a)(2) speaks of a "final disposition in the adversary adjudication."

[4]The Administrator also points out that the Board has also given itself the authority to reopen on its own motion the law judge's underlying initial decision on the merits. See § 821.43. That time, however, expired sometime in September 1991, and therefore would not assist petitioner in extending the final disposition date past January 29, 1992.

Second, petitioner's remaining argument assumes that final disposition must await the expiration of time the rules provide to file authorized pleadings. The difficulty with petitioner's argument, however, is that in this case petitions for reconsideration were not authorized and, thus, final disposition did not await the 30 days § 821.50 permits for such filings. As the Administrator notes, § 821.50(a) reads, in part, "Initial decisions which have become final because they were not appealed from shall not be deemed orders [for the purpose of petitions under this rule]." Also supporting the proposition that there may be no petition for reconsideration from an order dismissing an appeal is § 826.24(c)(4), which provides that final disposition includes issuance of a final order or any other final resolution of a proceeding, such as a settlement *or voluntary dismissal, which is not subject to a petition for reconsideration.* This is a logical result here, as there would be no reasonable expectation, given the circumstances, that a petition for reconsideration would be filed. The Administrator, although initially intending to challenge the decision, requested his appeal be considered withdrawn. He would not contest its dismissal, and petitioner (who did not appeal the law judge's favorable decision) would appear to have no reason to contest a decision allowing the Administrator to withdraw.

In sum, we reaffirm our prior conclusion that final disposition of the proceeding occurred with the issuance of the immediately effective December 22 order dismissing the Administrator's appeal, as provided in § 826.24(c)(4). Subparagraph (c)(3), in our view, does not apply, as no petition for reconsideration would lie here.

ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above order.